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No. 87-

Supreme Court, U.S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

RICHARD GERALD JORDAN,
Petitioner,

v.

STATE OF MISSISSIPPI,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSISSIPPI**

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QUESTIONS PRESENTED

The Supreme Court of Mississippi below denied a petition for post-conviction relief in a capital murder case on the sole ground that the Sixth Amendment claim raised in the petition had been previously addressed in earlier proceedings. In conflict with its practice in other cases, and without regard for the standards for retroactivity, the state court refused to consider an intervening decision by this Court that established that the prior dispositions of the claim were wrong as a matter of federal constitutional law. The questions presented are:

1. Whether, in addressing a post-conviction petition that raises a federal constitutional claim, a state court may decline to consider an intervening relevant decision of this Court solely on the ground that the claim was previously rejected before the intervening decision was announced?

2. If a state court can under some circumstances refuse to consider an intervening decision of this Court on the basis of state-law principles of *res judicata*, may it do so if it has in other similar post-conviction cases ignored those principles and reexamined federal claims in light of intervening decisions of this Court?

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STATE OF MISSISSIPPI,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSISSIPPI**

Richard Gerald Jordan petitions for a writ of certiorari to review the judgment of the Supreme Court of Mississippi denying him post-conviction relief with respect to his conviction for capital murder.

OPINION BELOW

The opinion of the Supreme Court of Mississippi denying Mr. Jordan's application for post-conviction relief is reported at 518 So. 2d 1186 and is reprinted at App. 1a-8a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) (1982). On September 23, 1987, the Supreme Court of Mississippi entered judgment denying Mr. Jordan's application for post-conviction relief. App. 7a-8a. On February 10, 1988, the Supreme Court of

Mississippi without opinion denied Mr. Jordan's timely motion for rehearing. App. 9a. On April 4, 1988, Justice White entered an order extending the time for Mr. Jordan to file for certiorari through Sunday, May 1, 1988.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Sixth Amendment to the Constitution of the United States:

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

Fourteenth Amendment to the Constitution of the United States:

No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 99-39-21(3) of the Mississippi Uniform Post-Conviction Collateral Relief Act, Miss. Code Ann. § 99-39-21(3) (Cum. Supp. 1987) :

§ 99-39-21. Procedural waiver of objections, defenses, claims; collateral estoppel; res judicata; burden of proof.

* * * *

(3) The doctrine of res judicata shall apply to all issues, both factual and legal, decided at trial and on direct appeal.

Section 99-39-23(6) of the Mississippi Uniform Post-Conviction Collateral Relief Act, Miss. Code Ann. § 99-39-23(6) (Cum. Supp. 1987) :

§ 99-39-23 Conduct of evidentiary hearing; right to counsel; finality of order as bar to subsequent motions; burden of proof.

* * * *

(6) . . . [A]ny order dismissing the prisoner's motion or otherwise denying relief under this chapter

is a final judgment and shall be conclusive until reversed. It shall be a bar to a second or successive motion under this chapter. . . . [E]xcepted from this prohibition are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the supreme court of either the state of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence

Section 99-39-27(9) of the Mississippi Uniform Post-Conviction Collateral Relief Act, Miss. Code Ann. § 99-39-27(9) (Cum. Supp. 1987):

§ 99-39-27. Application to supreme court for leave to proceed in trial court; grant of relief; dismissal or denial as res judicata.

* * * *

(9) The dismissal or denial of an application under this section is a final judgment and shall be a bar to a second or successive application under this chapter. . . . [E]xcepted from this prohibition are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the supreme court of either the state of Mississippi or the United States which would have actually adversely affected the outcome of his conviction

STATEMENT OF THE CASE

Richard Gerald Jordan is an inmate in state prison in Mississippi. This Petition arises from his conviction for capital murder and the subsequent denial by the Supreme Court of Mississippi of his application for post-conviction relief. As discussed below, Mr. Jordan's capital sentence was recently vacated. The State has indicated, however, that it intends again to seek the death penalty following resolution of this Petition.¹

¹ The vacating of Mr. Jordan's death sentence does not alter this Court's jurisdiction to review the judgment of the Supreme Court of Mississippi denying Mr. Jordan's application for post-conviction

On January 13, 1976, Mr. Jordan was arrested and charged with the murder of Edwina Marter. Mr. Jordan was advised of his *Miranda* rights and questioned by agents of the Federal Bureau of Investigation.²

Later that same day, Mr. Jordan was brought before a county judge for arraignment and preliminary hearing. Mr. Jordan was not represented by counsel at the hearing. The judge informed Mr. Jordan of his right to counsel and asked him if he desired to have counsel appointed. In the presence of the District Attorney, the Sheriff, and the Deputy Sheriff, Mr. Jordan requested that counsel be appointed and "expressed a desire to delay any proceedings until counsel was appointed." *Jordan v. State*, 365 So. 2d 1198, 1201 (Miss. 1978), cert. denied, 444 U.S. 885 (1979). The judge immediately appointed counsel, instructed the Sheriff and the Deputy

relief. *Brady v. Maryland*, 373 U.S. 83, 85 n.1 (1963). Like Brady, Mr. Jordan can only obtain a sentence of life imprisonment or death at a future sentencing hearing; the result of that hearing cannot alter or moot his conviction for capital murder. Under Mississippi law, the denial of Mr. Jordan's application for post-conviction relief is a "final judgment" that will bar further efforts by Mr. Jordan in state proceedings to overturn his conviction. See Miss. Code Ann. § 99-39-27(9) (Cum. Supp. 1987); see also App. 10a (mandate announcing "final judgment"). The decision below thus amounts to a final resolution by the highest state court in Mississippi of Mr. Jordan's constitutional challenge to his conviction and therefore may be reviewed by this Court. See *Bullington v. Missouri*, 451 U.S. 430, 437 n.8 (1981); *Harris v. Washington*, 404 U.S. 55, 56 (1971). Moreover, Mr. Jordan's application for post-conviction relief was an independent proceeding from the direct appeal of the sentence. Final judgments of state courts disposing of such independent proceedings are reviewable by this Court. See, e.g., *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 70-71 (1928).

² Mr. Jordan spoke with the federal agents outside the presence of counsel, but at the end of the interrogation refused to sign a written statement. Tr. 389. (References to "Tr." are to the transcript in *State of Mississippi v. Richard Gerald Jordan*, No. 7858 (Circuit Court, Jackson County, Mississippi)).

Sheriff to let Mr. Jordan confer with his appointed counsel, and postponed the taking of a plea.³

Less than forty-five minutes later—and before Mr. Jordan had an opportunity to meet or communicate with his court-appointed attorney—an investigator with the Sheriff's Department approached Mr. Jordan in the county jail and, after providing *Miranda* warnings, began to question him. The interrogation took place at the initiative and suggestion of the officer. It was conducted outside the presence of and without notice to Mr. Jordan's counsel. Inculpatory statements made by Mr. Jordan during the course of this interrogation were tape-recorded.⁴

In July 1976 the State of Mississippi prosecuted Mr. Jordan for capital murder. The trial court denied Mr. Jordan's motion to suppress the tape-recorded statements and permitted the State to play the tape-recording to the jury. The jury returned a guilty verdict and a sentence of death automatically followed under the Mississippi statute then in effect. The trial court, however, granted Mr. Jordan a new trial after the Supreme Court of Mississippi, to avoid constitutional problems, interpreted the statute not to provide for a mandatory death penalty.⁵

In February 1978 the State again prosecuted Mr. Jordan for capital murder. Mr. Jordan did not testify, but his tape-recorded statements were once more played to

³ Tr. 2513, 2515; Motion to Vacate and Set Aside Conviction, Jordan Aff., Exh. A (copy of transcript of January 13, 1976, proceeding) (motion filed April 13, 1987). See also *Jordan v. Watkins*, 681 F.2d 1067, 1071-72 (5th Cir. 1982).

⁴ Tr. 1747-48, 437-41. See also *Jordan v. Watkins*, 681 F.2d at 1072.

⁵ See *Jackson v. State*, 337 So. 2d 1242 (Miss. 1976).

the jury during the guilt phase of the trial over the objection of defense counsel.⁶ In closing argument at both the guilt and sentencing phases of the trial, the prosecutor relied extensively on Mr. Jordan's tape-recorded statements.⁷ The jury returned a guilty verdict and death sentence.

On appeal, Mr. Jordan again argued (among other things) that the admission of the tape-recorded statements violated his constitutional right to counsel. Rejecting this argument, the Supreme Court of Mississippi held that Mr. Jordan had made a knowing and intelligent waiver of that right when he responded to police questioning after receiving *Miranda* warnings. *Jordan v. State*, 365 So. 2d at 1203. The state court affirmed the conviction and capital sentence.

Mr. Jordan sought certiorari, citing his Sixth Amendment claim as a reason for the Court to grant the writ.⁸ This Court denied certiorari. *Jordan v. Mississippi*, 444 U.S. 885 (1979).

⁶ Tr. 2499, 2525, 2528; *see also* Tr. 1988-89.

⁷ Tr. 2649, 2667-68, 2803. The prosecutor focused especially on Mr. Jordan's description of himself in his tape-recorded statements as a "marksman" in an effort to show that the killing had been intentional and not, as the defense claimed, the result of an accidental shooting. Tr. 2667-68, 2803. Mr. Jordan had made no comparable assertion in his earlier statements to the FBI agents. Those statements had not been tape-recorded and were presented by the prosecution to the jury only through the testimony of one of the agents. *See supra* note 2.

⁸ In the petition for certiorari, the first question presented was: "Whether a custodial interrogation by law enforcement officers after petitioner had been presented in court for arraignment and counsel appointed, without notice to counsel, violates petitioner's right to counsel under the Sixth and Fourteenth Amendments?". Petition for Writ of Certiorari, at 2, *Jordan v. Mississippi*, No. 78-6577 (April 24, 1979).

Mr. Jordan subsequently commenced a habeas corpus proceeding in federal district court.⁹ Again, Mr. Jordan contended that the admission of his tape-recorded statements violated his right to counsel under the Sixth Amendment. Both the district court and, on appeal, the Fifth Circuit rejected Mr. Jordan's challenge to the admission of the tape-recorded statements and denied the writ with respect to the conviction. Like the Supreme Court of Mississippi, the district court and the Fifth Circuit concluded that Mr. Jordan had made a knowing and intelligent waiver of his right to counsel.¹⁰ The Fifth Circuit, however, vacated Mr. Jordan's death sentence, finding that the jury at the penalty phase had not been properly instructed in accord with this Court's decision in *Godfrey v. Georgia*, 446 U.S. 420 (1980). Neither the State nor Mr. Jordan sought certiorari from that decision.

Another sentencing proceeding ensued. The trial court excluded substantial mitigating evidence and again over the objections of defense counsel allowed the State to play the tape-recorded statements to the jury. On April 29, 1983, the jury returned a death sentence. On appeal, a sharply divided Supreme Court of Mississippi affirmed the death sentence. *Jordan v. State*, 464 So. 2d 475 (Miss. 1985).¹¹ On May 13, 1985, Mr. Jordan filed a

⁹ Mr. Jordan also unsuccessfully sought state post-conviction relief. See *In re Jordan*, 390 So. 2d 584 (Miss. 1980).

¹⁰ See *Jordan v. Watkins*, 681 F.2d at 1070-75.

¹¹ Four of the nine justices dissented, concluding that the trial court had impermissibly restricted Mr. Jordan's presentation of relevant mitigating evidence. Without reconsidering the merits of the issue, the state court unanimously rejected Mr. Jordan's challenge on appeal to the admission of the tape-recorded statements at the sentencing proceeding, holding that the issue was "*res judicata*." *Jordan v. State*, 464 So. 2d at 480. In support of this holding, the court cited its earlier decision on direct appeal from the 1978 conviction and the Fifth Circuit's decision in the federal habeas corpus proceeding. *Id.*

petition for certiorari requesting review of the judgment of the Supreme Court of Mississippi.¹²

While the petition for certiorari was pending, this Court decided *Michigan v. Jackson*, 475 U.S. 625 (1986). The facts in *Jackson* were remarkably similar to those in the present case. After their arrests, the defendants in *Jackson* received several sets of *Miranda* warnings and made statements to the police. Both defendants were then brought for arraignment. During the course of their arraignments, they requested the appointment of counsel. Thereafter, they were approached by police officers who, after again advising the defendants of their *Miranda* rights, questioned them outside the presence of counsel.

Unlike the Supreme Court of Mississippi and the Fifth Circuit in the present case, this Court in *Jackson* held that the post-arraignment statements were obtained in violation of the defendants' Sixth Amendment rights. Citing Sixth Amendment decisions dating back to 1938,¹³

¹² In his direct appeal to the Supreme Court of Mississippi from the 1983 sentencing determination, Mr. Jordan had raised eleven separate grounds for reversal, including the admission of his tape-recorded statements. See *Jordan v. State*, 464 So. 2d at 477. Because of space limitations, Mr. Jordan raised only three of these issues as reasons for grant of the writ in his subsequent 1985 petition to this Court for certiorari. Among the eight issues Mr. Jordan did not raise in the 1985 petition for certiorari was the admission at the sentencing proceeding of the tape-recorded statements. Because the sentence was subsequently vacated and Mr. Jordan is now entitled to a new sentencing hearing, the admission of the tape-recorded statements at the 1983 sentencing proceeding is not before the Court in connection with the present petition for certiorari.

¹³ See *Michigan v. Jackson*, 475 U.S. at 633 ("Almost a half century ago, in *Johnson v. Zerbst*, 304 U.S. 458 (1938), a case involving an alleged waiver of a defendant's Sixth Amendment right to counsel, the Court explained that we should 'indulge every reasonable presumption against waiver of fundamental constitutional rights'"); see also *Michigan v. Jackson*, 475 U.S. at 635 ("In *Brewer v. Williams*, 430 U.S. 387 (1977), . . . the Court held that a valid waiver of counsel rights should not be inferred from

this Court rejected the contention that the defendants had waived their right to counsel when they responded to police-initiated interrogation. *Michigan v. Jackson*, 475 U.S. at 635.

On April 29, 1986, this Court issued another decision bearing on Mr. Jordan's then-outstanding death sentence. In *Skipper v. South Carolina*, 476 U.S. 1 (1986), the Court reaffirmed that a defendant in a capital sentencing proceeding must be allowed wide latitude to introduce evidence in mitigation. Shortly thereafter, the Court granted Mr. Jordan's then-pending petition for certiorari, vacated his sentence, and remanded the case to the Supreme Court of Mississippi for reconsideration in light of *Skipper*. *Jordan v. Mississippi*, 476 U.S. 1101 (1986).

Following the remand, Mr. Jordan sought and was granted leave to brief the effect of both *Skipper* and *Jackson* on the pending death sentence. Based on *Jackson*, Mr. Jordan also filed a timely petition for leave to commence a collateral challenge to his conviction under the Mississippi Uniform Post-Conviction Collateral Relief Act ("Mississippi Collateral Relief Act").¹⁴ Mr. Jordan argued that the admission of the tape-recorded statements at the 1978 trial (which resulted in his conviction) and the 1983 sentencing proceeding (which resulted

the mere response by the accused to overt or more subtle forms of interrogation or other efforts to elicit incriminating information") (quoting *Edwards v. Arizona*, 451 U.S. 477, 484 n.8 (1981)).

¹⁴ Under the Mississippi Collateral Relief Act, an inmate whose conviction has been affirmed on direct appeal must, in the first instance, file his application for post-conviction relief in the Supreme Court of Mississippi and obtain an order permitting him to proceed with the petition in the trial court. Miss. Code Ann. § 99-39-7 (Cum. Supp. 1987). Accordingly, Mr. Jordan filed his application in the Supreme Court of Mississippi on April 13, 1987.

in his then-death sentence) violated his Sixth Amendment rights and that the contrary decisions by the Supreme Court of Mississippi and the Fifth Circuit could not be reconciled with this Court's holding in *Jackson*.¹⁵

On September 23, 1987, the Supreme Court of Mississippi vacated Mr. Jordan's death sentence on *Skipper* grounds.¹⁶ The state court, however, denied Mr. Jordan's application based on *Jackson* for collateral relief from the conviction. Citing its previous opinions and that of the Fifth Circuit, the Supreme Court of Mississippi summarily held that "the question is res judicata and is barred from relitigation."¹⁷ In so ruling, the state court did not suggest that, on the merits, *Jackson* could be distinguished or that the state court's previous rejection of Mr. Jordan's challenge to the admission of the tape-recorded statements could still be substantively justified.

Mr. Jordan filed a timely motion for reconsideration of that portion of the September 23, 1987, decision that denied him post-conviction relief. In the motion and supporting briefs, Mr. Jordan argued that the state court's refusal to reconsider the Sixth Amendment issue in light of *Jackson* was contrary to this Court's jurisprudence on retroactive application of decisions of constitutional law, was inconsistent with prior holdings of the Supreme Court of Mississippi and the terms of the Mississippi Col-

¹⁵ With respect to his conviction, Mr. Jordan argued that *Jackson* applied retroactively to collateral proceedings and that, under both federal and state law, the prior resolutions of Mr. Jordan's Sixth Amendment claim could not be given preclusive effect because of the intervening *Jackson* decision. See Motion to Vacate and Set Aside Conviction, at 8-11, 14-21 (April 13, 1987); Brief in Support of Application for Leave to File Motion to Vacate and Set Aside Conviction, at 5-8 (April 13, 1987).

¹⁶ App. 1a-6a. The court did not address Mr. Jordan's *Jackson* argument with respect to the sentence.

¹⁷ App. 8a.

lateral Relief Act, and accordingly was incompatible with the dictates of due process and equal protection.¹⁸

While the motion for reconsideration was pending, this Court decided *Yates v. Aiken*, 108 S. Ct. 534 (1988). In a unanimous opinion, this Court reiterated that state courts in post-conviction proceedings are bound by intervening Supreme Court decisions on issues of constitutional law that apply established legal principles to new fact situations, even when those decisions are rendered after the conviction became final. Mr. Jordan promptly brought the *Yates* decision to the attention of the Supreme Court of Mississippi,¹⁹ noting that the State had acknowledged that *Jackson* "is not new law."²⁰

Nevertheless, on February 10, 1988, the Supreme Court of Mississippi denied rehearing without opinion.

REASONS FOR GRANTING THE WRIT

This case raises important questions about the authority of state courts to refuse, on the basis of state rules of *res judicata*, to honor intervening decisions of federal constitutional law issued by this Court. Without addressing the merits of Mr. Jordan's *Jackson* claim—and without any regard for the standards developed by this Court for retroactive application of decisions of federal constitutional law—the Supreme Court of Mississippi denied Mr. Jordan's application for post-conviction relief on the

¹⁸ See Petition for Partial Rehearing and Brief in Support of Petition for Partial Rehearing (Oct. 8, 1987); Petitioner's Reply to State's Response to Petition for Partial Rehearing (Dec. 28, 1987).

¹⁹ See Letter Brief from Philip D. Anker, Counsel to Mr. Jordan, to Sue Gordon, Clerk, Supreme Court of Mississippi (Jan. 15, 1988).

²⁰ Response to Motion to Vacate and Set Aside Conviction, at 4 (June 15, 1987); Response [to] Petition for Partial Rehearing, at 7 (Dec. 14, 1987).

sole ground that the earlier judicial determinations that Mr. Jordan had made a knowing and intelligent waiver of his Sixth Amendment right to counsel foreclosed further consideration of the claim.

The state court's *res judicata* holding means that Mr. Jordan stands convicted of capital murder and faces the possibility of a death sentence on the basis of tape-recorded statements taken from him in violation of his Sixth Amendment right to counsel. As we show below, the refusal by the Supreme Court of Mississippi to re-examine the earlier decisions—decisions that, in light of *Jackson*, are plainly erroneous²¹—is contrary to this Court's precedents as well as previous decisions of the Supreme Court of Mississippi and the Mississippi Collateral Relief Act. If allowed to stand, the decision be-

²¹ This Court in *Jackson* rejected precisely the same arguments that the Supreme Court of Mississippi on direct appeal and the Fifth Circuit in the federal habeas corpus proceeding accepted in concluding that Mr. Jordan had knowingly and intelligently waived his Sixth Amendment right to counsel. The Supreme Court of Mississippi emphasized that Mr. Jordan had received several sets of *Miranda* warnings and had already given a statement outside the presence of counsel before he requested the appointment of a lawyer and was subjected to a second interrogation. *Jordan v. State*, 365 So. 2d at 1202-03. The defendants in *Jackson* had likewise received several sets of *Miranda* warnings and had given statements before they invoked their right to counsel and were subjected to further questioning. See *Michigan v. Jackson*, 475 U.S. at 627 & n.1, 628. The Fifth Circuit emphasized that Mr. Jordan had requested counsel during an arraignment and construed the request only to encompass legal representation for purposes of judicial proceedings. *Jordan v. Watkins*, 681 F.2d at 1073-74. The defendants in *Jackson* had also made their requests for counsel at arraignments, and this Court specifically "rejecte[d] the State's suggestion that [defendants'] requests for counsel should be construed to apply only to representation in formal legal proceedings." *Michigan v. Jackson*, 475 U.S. at 633. See *United States ex rel. Espinoza v. Fairman*, 813 F.2d 117, 123-24 n.5 (7th Cir.) (recognizing that the Fifth Circuit's *Jordan* decision may not be good law and declining to follow it in light of this Court's *Jackson* decision), cert. denied, 107 S. Ct. 3240 (1987).

low could have far-reaching implications, permitting state courts in a wide variety of criminal cases in which there have been intervening decisions to invoke *res judicata* and thereby ignore this Court's holdings on retroactivity, including that this term in *Yates v. Aiken*, 108 S. Ct. 534 (1988).

I. The Decision Below Raises Important Questions About the Authority of State Courts in Post-Conviction Proceedings To Refuse To Apply Intervening Decisions of This Court Without Regard for Their Retroactivity.

The decision below rests on the remarkable holding that the prior resolutions of Mr. Jordan's Sixth Amendment claim—both of which arose before *Michigan v. Jackson*—were *res judicata* and barred further consideration of the claim in light of *Jackson*.²² That holding ignores the tests developed by this Court for retroactive application of decisions of constitutional law. Under those standards, *Jackson* must be applied retroactively, and the Supreme Court of Mississippi cannot decline even to consider the question.

The decision below is contrary to this Court's unanimous decision this term in *Yates v. Aiken*, 108 S. Ct. 534 (1988). In *Yates*, the Court held that intervening decisions of this Court that give effect to established principles of law in new and different factual situations

²² The court below noted that Mr. Jordan (like the State) had not sought certiorari from the Fifth Circuit's decision which denied him habeas corpus relief with respect to his conviction, but which vacated his then-pending death sentence. As discussed above, however, Mr. Jordan had previously raised his Sixth Amendment claim in his unsuccessful 1979 petition for certiorari from the judgment of the Supreme Court of Mississippi affirming his conviction. *Cf. Fay v. Noia*, 372 U.S. 391, 435-36 (1963) (holding that a defendant's failure to seek certiorari from a judgment with respect to a state criminal conviction will not generally preclude the defendant from bringing a subsequent collateral challenge in federal court to the conviction).

must be applied retroactively even in state collateral proceedings. *Jackson*, like *Francis v. Franklin*, 471 U.S. 307 (1985), the case at issue in *Yates*, is a decision that should be applied retroactively in collateral proceedings. As this Court emphasized, the holding in *Jackson* that an accused who requests an attorney at arraignment does not waive his right to counsel merely by later responding to police-initiated interrogation was an application of a well-established line of cases narrowly construing purported waivers of the right to counsel.²³

The State itself contended below that *Jackson* was "not new law,"²⁴ and the Supreme Court of Mississippi never questioned that contention.²⁵ Rather, the state court sim-

²³ Relying on *Johnson v. Zerbst*, 304 U.S. 458 (1938), and *Brewer v. Williams*, 430 U.S. 387 (1977), the Court in *Jackson* described its precedents as establishing a "settled approach to questions of waiver." *Michigan v. Jackson*, 475 U.S. at 633 (emphasis added). The Court in *Jackson* also relied on its Fifth Amendment decision in *Edwards v. Arizona*, 451 U.S. 477 (1981), noting that the decision in *Edwards* stemmed in part from earlier Sixth Amendment cases. *Michigan v. Jackson*, 475 U.S. at 635 & n.9; see also *supra* note 13.

²⁴ See *supra* note 20. Even if *Jackson* were deemed in some sense a change in law, it certainly is not a "clear break" with past precedent and should be applied retroactively in this case. See *Fleming v. Kemp*, 837 F.2d 940 (11th Cir. 1988) (concluding that *Jackson* established new law, but nevertheless holding that it should apply retroactively in a federal habeas corpus proceeding with respect to a Sixth Amendment claim involving the sentencing phase of a death penalty case). But see *Delaware v. Flamer*, No. IK79-11-0236 (Del. Supr. Ct. June 29, 1987) (LEXIS, States library, Del. file).

²⁵ Indeed, it appears *sub silentio* to have so held in another case. In *Johnson v. State*, 508 So. 2d 1126 (Miss. 1987), a death row inmate filed a motion for post-conviction relief. Relying on *Jackson*, Johnson argued (among other things) that a confession had been elicited from him in violation of his Sixth Amendment right to counsel. Johnson had not raised the Sixth Amendment claim in his direct appeal, and the Supreme Court of Mississippi held that there was not adequate "cause" to excuse the waiver. *Id.* at 1127. The

ply disregarded *Yates* and the standards for retroactive application of decisions of constitutional law that this Court has developed. The Supreme Court of Mississippi appears to have proceeded on the premise that even if this Court's precedents required that *Jackson* be applied retroactively in collateral proceedings, it could nevertheless ignore *Jackson* because of the previous dispositions of Petitioner's Sixth Amendment claim.

That premise is invalid. As this Court has stressed, *res judicata* has no applicability when "between the time of the first judgment and the second there has been an intervening decision or a change in the law creating an altered situation." *State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154, 162 (1945).²⁶

The implications of the decision below are potentially far-reaching. If a state court in a collateral proceeding can refuse on *res judicata* grounds to honor an intervening decision by this Court—even if that decision applies retroactively in collateral proceedings—then *Yates* will be of little if any significance. Under the Mississippi Collateral Relief Act, as with the post-conviction relief procedures of many states, the failure to assert on direct appeal a claim that could have been raised at that stage

State, in the present case, read the opinion of the Supreme Court of Mississippi in *Johnson* as holding that *Jackson* "is not new law." Response [to] Petition for Partial Rehearing, at 7 (Dec. 14, 1987). The Fifth Circuit in a federal habeas corpus proceeding involving the same defendant expressly held that *Jackson* "did not create a new rule of law" and that therefore Johnson's failure to raise the claim in earlier federal habeas corpus proceedings amounted to an abuse of the writ. *Johnson v. Cabana*, 818 F.2d 333, 344 (5th Cir. 1987).

²⁶ Accordingly, this Court has held that the rejection by a federal court of a federal constitutional claim is not an automatic bar to reconsideration of the claim in a subsequent federal habeas corpus proceeding when there has been an intervening relevant decision. See *Davis v. United States*, 417 U.S. 333, 342 (1974); *Sanders v. United States*, 373 U.S. 1, 17 (1963). But cf. *Kuhlmann v. Wilson*, 477 U.S. 436, 444-56 (1986) (opinion of four Justices).

generally bars consideration of the claim in a post-conviction proceeding.²⁷ The Supreme Court of Mississippi has relied in recent years on this principle in numerous post-conviction cases in which it has held that claims have been waived; indeed, it has done so in a post-conviction case raising a *Jackson* claim.²⁸ Accordingly, if the decision below is allowed to stand, intervening decisions that under *Yates* apply retroactively in collateral proceedings could nonetheless be disregarded in those proceedings: if the defendant failed to raise the issue on direct appeal, he will be held to have waived the claim; if he raised the issue on direct appeal, the disposition of the issue there will be held under the doctrine of *res judicata* to bar any consideration of the issue in light of the intervening decision.

This is not an isolated case. In another recent death penalty case, *Wiley v. State*, 517 So. 2d 1373 (Miss. 1987), *petition for cert. filed*, 56 U.S.L.W. 3667 (U.S. Mar. 29, 1988) (No. 87-1520), the Supreme Court of Mississippi likewise refused on *res judicata* grounds to apply an intervening decision of this Court. At Wiley's sentencing hearing, the victim's wife was allowed to testify about her husband's character. On direct appeal, the Supreme Court of Mississippi upheld the admission of the testimony. *Wiley v. State*, 484 So. 2d 339 (Miss.),

²⁷ Miss. Code Ann. § 99-39-21(1) (Cum. Supp. 1987). The statute authorizes state courts not to enforce the waiver rule when the defendant demonstrates "cause" and "actual prejudice," but the existence of an intervening decision that applies established legal principles to a new fact situation does not satisfy the "cause" requirement. See Miss. Code Ann.—§ 99-39-21(4) (Cum. Supp. 1987); cf. *Smith v. State*, 434 So. 2d 212, 215 n.3 (Miss. 1983); see also *supra* note 25.

²⁸ See *supra* note 25; see also, e.g., *Wiley v. State*, 517 So. 2d 1373, 1378 (Miss. 1987), *petition for cert. filed*, 56 U.S.L.W. 3667 (U.S. Mar. 29, 1988) (No. 87-1520); *Wilcher v. State*, 479 So. 2d 710, 712 (Miss. 1985), *cert. denied*, 475 U.S. 1098 (1986); *Leatherwood v. State*, 473 So. 2d 964, 966 (Miss. 1985).

cert. denied, 107 S. Ct. 304 (1986). Wiley subsequently filed for post-conviction relief, relying on this Court's intervening decision in *Booth v. Maryland*, 107 S. Ct. 2529 (1987). Without considering the retroactive effect of *Booth*, the Supreme Court of Mississippi held that its disposition of the issue on direct appeal barred further consideration of the point. *Wiley v. State*, 517 So. 2d at 1377.

On at least two separate recent occasions, the Supreme Court of Mississippi has thus refused to apply intervening decisions of this Court without regard to their retroactivity. In order to ensure that *Yates v. Aiken* is not an empty gesture, the Court should grant certiorari to make plain that state courts cannot, on *res judicata* grounds, refuse to honor intervening decisions by this Court that apply retroactively.

II. The Decision Below Raises Important Questions About the Authority of State Courts To Refuse To Consider Federal Constitutional Claims on the Basis of State Procedural Rules That Are Not Uniformly and Evenhandedly Enforced.

Even if state courts can under some circumstances apply state rules of *res judicata* and thereby refuse to honor intervening decisions of this Court, the court below could not constitutionally do so here. In a number of other cases also on collateral review, the Supreme Court of Mississippi has reconsidered claims that it had previously addressed on direct appeal where there had been an intervening decision that called into question the earlier resolutions of the claims. In the present case and in *Wiley*, the Supreme Court of Mississippi has disregarded its prior practice without explanation. This case thus presents important questions concerning the authority of state courts to refuse to consider the merits of federal claims on the basis of a state procedural rule—in this case, *res judicata*—that the state court has not applied uniformly and evenhandedly.

The inconsistency between the refusal by the Supreme Court of Mississippi to consider the merits of Mr. Jordan's *Jackson* claim in this case and its practice in other cases is readily apparent. In *Edwards v. Thigpen*, 433 So. 2d 906 (Miss. 1983), a post-conviction proceeding, the Supreme Court of Mississippi refused to reconsider several claims that Edwards had raised on direct appeal, invoking the principle that issues addressed on direct appeal "are res judicata and barred." *Id.* at 907; *see also id.* at 908. The court, however, reconsidered one claim that Edwards had similarly raised on direct appeal—that the imposition of the death penalty on him was disproportionate and arbitrary—evidently because Edwards based his reassertion of the claim on this Court's intervening decision in *Enmund v. Florida*, 458 U.S. 782 (1982). *Edwards v. Thigpen*, 433 So. 2d at 908. Similarly, in *Culberson v. State*, 412 So. 2d 1184 (Miss. 1982), the Supreme Court of Mississippi granted post-conviction relief with respect to a claim of ineffective assistance of counsel that had been raised and rejected on direct appeal from Culberson's second conviction and death sentence. The court reached this result based on this Court's intervening decision in *Cuyler v. Sullivan*, 446 U.S. 335 (1980).²⁹

²⁹ Culberson had claimed in his direct appeal that his trial counsel had refused to allow him to testify in his own behalf. The Supreme Court of Mississippi had rejected the claim on the ground that a defendant who retains counsel waives the right to challenge his lawyer's competence. *Culberson v. State*, 379 So. 2d 499 (Miss. 1979), *cert. denied*, 449 U.S. 986 (1980). After the appeal had been decided, this Court issued its decision in *Cuyler*, holding that a defendant is entitled under the Sixth Amendment to effective assistance of counsel whether counsel is appointed or retained. In Culberson's subsequent collateral proceeding, the Supreme Court of Mississippi—relying on *Cuyler*—granted a writ of error coram nobis and remanded for an evidentiary hearing to determine whether Culberson's counsel had prevented him from testifying. *Culberson v. State*, 412 So. 2d at 1185-86.

Citing *Culberson* and several other cases, the Supreme Court of Mississippi declared in unequivocal terms—as recently as 1983—that “Mississippi post-conviction relief procedures may be employed to either obtain relief under a retroactively applied court decision, or to test the retroactivity of such a decision.” *Smith v. State*, 434 So. 2d 212, 215 (Miss. 1983). Yet that is precisely what the Supreme Court of Mississippi has not allowed in this case. It has refused to consider the retroactivity of *Jackson* on a state-law ground—*res judicata*—that it previously had not deemed dispositive in other cases.³⁰ It has done so without explanation even though Mr. Jordan specifically called the court’s attention to the inconsistency between its holding here and those in *Edwards* and *Culberson*.³¹

Given its prior contrary practice, the Supreme Court of Mississippi cannot in this case invoke *res judicata* and refuse to consider Mr. Jordan’s *Jackson* claim. “State courts may not avoid deciding federal issues by invoking state procedural rules that they do not apply evenhandedly to all similar claims.” *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982); see also *James v. Kentucky*, 466 U.S. 341, 348-49 (1984) (only state procedural rules that are “firmly established and regularly followed . . . can prevent implementation of federal constitutional rights”).

The inconsistency between the state court’s refusal to consider the *Jackson* claim in this case and Mississippi practice elsewhere is underscored by the Mississippi Collateral Relief Act. Under the terms of that statute, the denial of an application for post-conviction relief gen-

³⁰ At least until recently, the Supreme Court of Mississippi had similarly not applied its waiver rule consistently in post-conviction cases, often reaching the merits of claims that had not been raised on direct appeal. See *Wheat v. Thigpen*, 793 F.2d 621 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1566 (1987).

³¹ See Brief in Support of Petition for Partial Rehearing, at 2-3 (Oct. 8, 1987); Petitioner’s Reply to State’s Response to Petition for Partial Rehearing, at 1-2 (Dec. 28, 1987).

erally bars a second application. Miss. Code Ann. § 99-39-23(6) (Cum. Supp. 1987). But the statute specifically exempts from this prohibition cases "in which the prisoner can demonstrate . . . that there has been an intervening decision of the supreme court of either the state of Mississippi or the United States which would have actually adversely affected the outcome of his conviction." *Id.*³²

Without any mention of its earlier decisions in *Edwards* and *Culberson*,³³ the Supreme Court of Mississippi has recently construed the statutory exception not to apply with respect to an issue raised and decided on direct appeal. It has held that the exception does not preclude the court from invoking *res judicata* and refusing to reach the merits of a post-conviction claim where the defendant raised the issue in question originally on direct

³² See also Miss. Code Ann. § 99-39-27(9) (Cum. Supp. 1987) (providing that a denial by the Supreme Court of Mississippi of leave to file an application under the Collateral Relief Act generally bars a second application *except where there has been an intervening decision*). Mr. Jordan below relied on §§ 99-39-23(6) and 99-39-27(9), arguing that in light of those provisions the state court's *res judicata* holding denied him due process and equal protection under the federal constitution. See Brief in Support of Petition for Partial Rehearing, at 1-2, 6-8 & n.5 (Oct. 8, 1987); Mr. Jordan's Reply to State's Response to Petition for Partial Rehearing, at 1 (Dec. 28, 1987); see also Brief in Support of Application for Leave to File Motion to Vacate and Set Aside Conviction, at 6-7 (April 13, 1987).

³³ Those cases were decided before the passage of the Mississippi Collateral Relief Act. The Supreme Court of Mississippi has held, however, that the Mississippi Collateral Relief Act simply codified the post-conviction procedures established in state *coram nobis* and habeas corpus cases. See, e.g., *Irving v. State*, 498 So. 2d 305, 308 (Miss. 1986), *cert. denied*, 107 S. Ct. 1986 (1987); see also Miss. Code Ann. § 99-39-3(1) (stating that "[t]he relief formerly accorded by [writs of error *coram nobis* and habeas corpus] may be obtained by an appropriate motion under [the Mississippi Collateral Relief Act]").

appeal; instead, it has read the statute as only providing an exception from "the prohibition of second petitions." *Wiley v. State*, 517 So. 2d 1373, 1377 (Miss. 1987), *petition for cert. filed*, 56 U.S.L.W. 3667 (U.S. Mar. 29, 1988) (No. 87-1520). Thus the law in Mississippi, after the decisions in *Jordan* and *Wiley*, appears to be as follows: if a defendant raises a claim on direct appeal, he will be precluded on *res judicata* grounds from relitigating the issue in a post-conviction proceeding even where there has been an intervening decision that demonstrates that the resolution of the claim on direct appeal was wrong as a matter of federal constitutional law; however, if a defendant raises a claim initially in a post-conviction proceeding—and his failure to raise the issue on direct appeal does not constitute a waiver of the claim³⁴—he will be permitted to relitigate the issue in a second post-conviction proceeding based on an intervening decision.

As Mr. Jordan argued below,³⁵ there is no rational basis for Mississippi to distinguish, for *res judicata* purposes, between defendants who initially raised their claim on direct review and defendants who initially raised their claim in a post-conviction proceeding.³⁶ Even if a state court could refuse in all post-conviction proceedings to

³⁴ The Supreme Court of Mississippi has held that some claims may be raised in the first instance in a post-conviction proceeding. See, e.g., *Wiley v. State*, 517 So. 2d at 1378 (claim of ineffective assistance of trial counsel in a case in which trial counsel also represented the defendant on direct appeal).

³⁵ See Brief in Support of Petition for Partial Rehearing, at 7 n.7 (Oct. 8, 1987).

³⁶ Cf. *Davis v. United States*, 417 U.S. 333, 342 (1974) (holding that an intervening decision may entitle a petitioner in a federal habeas corpus proceeding to a new hearing with respect to a claim had been previously resolved, whether the claim had been previously resolved in an earlier federal collateral proceeding or on direct review of the conviction).

honor intervening decisions of this Court, it violates equal protection and due process for a state court to do so only in some cases based on arbitrary distinctions between the defendants involved. See *Mayer v. City of Chicago*, 404 U.S. 189, 193 (1971) ("For 'it is now fundamental that, once established . . . avenues [of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts'") (quoting *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966)).³⁷ Moreover, Mississippi's apparent willingness to ignore *res judicata* principles and to consider the merits of reasserted claims in post-conviction cases in which the defendant raised the claim initially in an earlier post-conviction proceeding demonstrates that Mississippi has "no substantial state interest" that could warrant its application of *res judicata* here and consequent refusal to consider Mr. Jordan's *Jackson* claim. *Henry v. Mississippi*, 379 U.S. 443, 449 (1965); see also *James v. Kentucky*, 466 U.S. at 348-49 (1984).

³⁷ An arbitrary denial of a state-provided remedy violates due process. See, e.g., *Evitts v. Lucey*, 469 U.S. 387, 393-94, 400-01 (1985); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431-32 (1982); *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980); *Vitek v. Jones*, 445 U.S. 480, 488-89 (1980). And, as the Court held in *Yates*, a state court considering federal claims in state post-conviction proceedings must provide the relief required by federal law. *Yates v. Aiken*, 108 S. Ct. at 538.

CONCLUSION

For the reasons stated, we respectfully request that the Court grant certiorari. We also respectfully suggest that the Court may wish to consider remanding this case to the Supreme Court of Mississippi for further consideration in light of *Yates v. Aiken*, 108 S. Ct. 534 (1988).

Respectfully submitted,

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APPENDIX

ALPHABET

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APPENDIX

IN THE SUPREME COURT OF MISSISSIPPI

DP-44

RICHARD GERALD JORDAN

v.

STATE OF MISSISSIPPI

ON REMAND FROM THE
UNITED STATES SUPREME COURT

EN BANC.

ROY NOBLE LEE, PRESIDING JUSTICE, FOR
THE COURT:

The Court considers this case today upon remand to the Supreme Court of Mississippi after the United States Supreme Court granted a petition for writ of certiorari. *Richard Gerald Jordan, Petitioner v. Mississippi*, 106 S.Ct. 1942 (1986). The U. S. Supreme Court vacated the judgment imposing the death penalty upon Jordan and remanded to this Court for further consideration in the light of *Skipper v. South Carolina*, 476 U.S. —, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986).

Richard Gerald Jordan was first tried and found guilty on June 21, 1976, for the capital murder of Mrs. Edwina Marter. The conviction was prior to the decision in *Jackson v. State*, 337 So. 2d 1242 (Miss. 1976), which provided guidelines and bifurcated trials in capital murder cases. The lower court granted a motion for new

trial under the precedents of *Jackson* and *Jordan* was tried, convicted and sentenced to death a second time. The conviction and sentence were affirmed in *Jordan v. State*, 365 So. 2d 1198 (Miss. 1978). Subsequently, the United States Fifth Circuit Court of Appeals vacated the sentence on habeas corpus petition and remanded for another sentencing hearing, holding that under *Godfrey v. Georgia*, 446 So. 2d 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), the instructions of the trial court failed to channel the sentencer's discretion by clear and objective standards and did not provide specific and detailed guidance.

A new sentencing hearing was held by the Circuit Court of Harrison County, Mississippi, First Judicial District, and the jury imposed the death penalty on Jordan April 29, 1983, being the third time Jordan had been sentenced to death. That death sentence was affirmed by this Court January 30, 1985, and rehearing was denied March 13, 1985. *Jordan v. State*, 464 So. 2d 475 (Miss. 1985). Appellant then filed a petition for writ of certiorari with the United States Supreme Court on May 13, 1985, citing three grounds for relief. One such ground was sustained and follows:

1. Whether, in a capital sentencing proceeding, exclusion of virtually all evidence of a defendant's socially useful behavior while in prison and other mitigating evidence is consistent with *Lockett v. Ohio*, 438 U.S. 586 (1978), and the requirement of individualized sentencing.

In *Skipper*, following the introduction by the State of evidence in aggravation of the offense, petitioner presented as mitigating evidence his own testimony and that of his former wife, his mother, his sister and his grandmother. Testimony, for the most part, concerned the difficult circumstances of his upbringing. Petitioner and his former wife, however, both testified briefly that

petitioner had conducted himself well during the 7-1/2 months he spent in jail between his arrest and trial, and petitioner further testified that during a prior period of incarceration he had earned the equivalent of a high school diploma and that, if sentenced to life imprisonment, rather than to death, he would behave himself in prison and would attempt to work so that he could contribute money to the support of his family. In addition, he sought to introduce testimony of two jailers and one regular visitor to the jail to the effect that petitioner had made a good adjustment during his time spent in jail. The South Carolina trial court ruled that under the decision of the South Carolina Supreme Court in *State v. Koon*, 278 S.C. 528, 298 S.E.2d 769 (1982), such evidence would be irrelevant and inadmissible.

The U.S. Supreme Court stated the following:

Accordingly, the only question before us is whether the exclusion from the sentencing hearing of the testimony petitioner proffered regarding his good behavior during the over seven months he spent in jail awaiting trial deprived petitioner of his right to place before the sentencer relevant evidence in mitigation of punishment. It can hardly be disputed that it did. The State does not contest that the witnesses petitioner attempted to place on the stand would have testified that petitioner had been a well-behaved and well-adjusted prisoner, nor does the State dispute that the jury could have drawn favorable inferences from this testimony regarding petitioner's character and his probable future conduct if sentenced to life in prison. Although it is true that any such inferences would not relate specifically to petitioner's culpability for the crime he committed, see *Koon I*, *supra*, at 536, 298 SE2d, at 774, there is no question but that such inferences would be "mitigating" in the sense that they might serve "as a basis for a sentence less than death." *Lockett*, *supra*, at 604, 71

L Ed 2d 1, 102 S Ct 869. Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing: "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose." *Jurek v. Texas*, 428 US 262, 275, 49 L Ed 2d 929, 96 S Ct 2950 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). The Court has therefore held that evidence that a defendant would in the future pose a danger to the community if he were not executed may be treated as establishing an "aggravating factor" for purposes of capital sentencing, *Jurek v. Texas*, supra; see also *Barefoot v. Estelle*, 463 US 880, 77 L Ed 2d 1090, 103 S Ct 3383 (1983). Likewise, evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating. Under *Eddings*, such evidence may not be excluded from the sentencer's consideration.

476 U.S. at —, 106 S.Ct. at 1771, 90 L.Ed.2d at 6-7. See also *Dutton v. Brown*, 812 F.2d 593, 600-602 (10th Cir. 1983).

During the sentencing phase of the trial, Jordan introduced testimony in mitigation from sixteen (16) witnesses in addition to his own testimony. Of those sixteen people, six (6) were family members, five (5) were friends, three (3) were jail inmates and prison chaplains, a prison guard and a pathologist. They testified to his life during childhood and boyhood, as a husband and father, engaging in sports, as a church member. All of the testimony was favorable and praiseworthy of the appellant. Lucius Brown, a prison guard, testified that he had chosen Jordan to be a "hall man" with certain responsibilities in the prison and toward other inmates and was highly complimentary of his conduct.

Jordan contends that the lower court impermissibly restricted testimony concerning mitigating facts, *e.g.*, certain parts of testimony of Robert Jordan, brother of appellant, Shirley Thames, first cousin, Lucius Brown, prison guard, and the entire testimony of Rhett Russell. In the original opinion, entered January 30, 1985, this Court discussed the evidence of each of those witnesses and concluded that the restriction imposed by the trial court on the first three and exclusion of the testimony of Rhett Russell did not constitute reversible error. *Skipper v. South Carolina*, *supra*, decided April 29, 1986, holds otherwise. In concluding its opinion, the U.S. Supreme Court said:

The exclusion by the state trial court of relevant mitigating evidence impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender. The resulting death sentence cannot stand, although the State is of course not precluded from again seeking to impose the death sentence, provided that it does so through a new sentencing hearing at which petitioner is permitted to present any and all relevant mitigating evidence that is available. *Eddings*, 455 US, at 117, 71 L Ed 2d 1, 102 S Ct 869. The judgment of the Supreme Court of South Carolina is therefore reversed insofar as it affirms the death sentence, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

476 U.S. at —, 106 S.Ct. at 1773, 90 L.Ed.2d at 9.

The testimony of Rhett Russell, as proffered, was to the effect that he would testify about a method for generating electricity from an alternative energy source, as it is known, through wind tunnels and things of that nature; that Mr. Jordan has been in contact with the

Tennessee Valley Authority over this invention and has entered into an agreement with them about it; and that Mr. Russell is familiar with all those details and would testify about them.

The State advances several reasons why this Court should not remand for a new sentencing hearing, although conceding that "under the ruling in *Skipper* we now know that this type material is relevant and the opinion of this Court to the contrary is erroneous."

We are not persuaded by the argument of the State in the light of the holding in *Skipper v. South Carolina*, *supra*. Therefore, this cause is remanded to the Circuit Court of Harrison County, Mississippi, for a new sentencing hearing.

REMANDED TO THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI, FOR SENTENCING HEARING, CONSISTENT WITH THIS OPINION.

WALKER, C.J., HAWKINS, P.J., DAN LEE, PRATHER, ROBERTSON, SULLIVAN, ANDERSON and GRIFFIN, JJ., CONCUR.

ON APPLICATION FOR LEAVE TO FILE MOTION
TO VACATE AND SET ASIDE CONVICTION

EN BANC.

ROY NOBLE LEE, PRESIDING JUSTICE, FOR
THE COURT:

Richard Gerald Jordan has filed an Application for Leave to File Motion to Vacate and Set Aside Conviction, pursuant to the Mississippi Uniform Post-Conviction Collateral Relief Act, Ch. 378, Miss. Gen. Laws 1984, Mississippi Code Annotated § 99-39-7 and § 99-39-27 (Supp. 1986). The motion to vacate and set aside the conviction and the relief prayed for is based on the United States Supreme Court's decision in *Michigan v. Jackson*, 106 S.Ct. 1404 (1986). Jordan claims that the admission at trial of tape recorded statements taken from him outside the presence of counsel violated his Sixth Amendment rights.

Jordan first presented this question on his direct appeal decided in 1978 and the issue was resolved against him at that time. See *Jordan v. State*, 365 So. 2d 1198, 1201-03 (Miss. 1978). The question was next raised in a federal habeas corpus proceeding where it was denied. The Court of Appeals for the Fifth Circuit addressed the issue on appeal on the denial of habeas relief by the District Court and found that no error was involved and denied any relief on those grounds. *Jordan v. Watkins*, 681 F.2d 1067, 1070-75 (5th Cir. 1982). The issue was not addressed in the opinion on petition for rehearing before the Fifth Circuit. Jordan again raised the question on direct appeal from his resentencing. In response, this Court quoted from the opinion of the Fifth Circuit and held: "We are of the opinion that the State met its burden with respect to Jordan and that the question is now res judicata." *Jordan v. State*, 464 So. 2d 475, 480 (Miss. 1985). The issue was not raised in Jordan's peti-

tion for writ of certiorari from his last death sentence affirmance.

We are of the opinion that Jordan's conviction of capital murder became final in 1982 when the Fifth Circuit upheld his conviction of capital murder and he did not petition the United States Supreme Court to review that decision. We hold that the question is *res judicata* and is barred from relitigation.

Therefore, the application is denied.

APPLICATION DENIED.

WALKER, C.J., HAWKINS, P.J., DAN LEE,
PRATHER, ROBERTSON, SULLIVAN, ANDERSON
and GRIFFIN, JJ., CONCUR.

IN THE SUPREME COURT OF MISSISSIPPI
DECISIONS HANDED DOWN FEBRUARY 10, 1988

* * * *

THE COURT SITTING EN BANC:

* * * *

DP-44 Richard Gerald Jordan v. State; Circuit,
Harrison; Petition for Rehearing Denied.
Petition for Writ of Mandamus Denied
Without Prejudice to Proceed in Circuit
Court of Harrison County.

* * * *

MANDATE FROM THE
SUPREME COURT OF MISSISSIPPI

TO THE CIRCUIT COURT OF HARRISON
COUNTY—GREETINGS:

WHEREAS, on the 23rd day of September, 1987, the same being a day of the regular term of the Mississippi Supreme Court, begun and held in the Courtroom, in the Gartin Building, in the City of Jackson, Mississippi, on the 2nd Monday of September, in the year of our Lord, 1987, the following final judgment was rendered by the Mississippi Supreme Court, to-wit:

DP-No. 44

RICHARD GERALD JORDAN

VS.

STATE OF MISSISSIPPI

This cause having been submitted on remand from the United States Supreme Court, and this Court, having considered the same, is of the opinion that the cause should be remanded to the Circuit Court of Harrison County, Mississippi, for sentencing hearing consistent with the opinion of the Supreme Court.

The Application for Leave to File Motion to Vacate and Set Aside Conviction is denied.

WEDNESDAY, FEBRUARY 10, 1988:

This cause came on to be heard on Petition for Re-hearing and this Court having considered the same is of the opinion that the same should be denied and same is hereby denied. The Petition for Writ of Mandamus is hereby denied without prejudice to proceed in the Circuit Court of Harrison County.

YOU ARE THEREFORE HEREBY COMMANDED,
that such execution and further proceedings be had in
said cause, as according to right and justice, and the
judgment of our SUPREME COURT and the law of the
land ought to be had.

WITNESS, the Hon. Roy Noble Lee
Chief Justice of the Mississippi Su-
preme Court; also the signature of
the Clerk and the Seal of said Court
hereunto affixed, at office, in the City
of Jackson, this the 14th day of
March, A.D., 1988

/s/ Sue Gordon, Clerk
_____ D.C.

(Trial Court #18,807.)